



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Daniel W. Van Vleet
Appl. No.: 09/817,522
Filed: 03/26/2001
Docket No.: 1752
Conf. No. 7905
Title: **APPARATUS AND METHOD FOR SIMULATED CAMPFIRE**

Art Unit: 3743
Examiner: Kathryn P. Ferko

Action: **Appeal Brief**
Date: July 21, 2003

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Sir:

This Appeal is from the Final Rejection of claims 1-6 and 8-34 in the above-referenced patent application. A Notice of Appeal was mailed by Appellant on February 13, 2003, with a certification pursuant to 37 C.F.R. § 1.8, and was received by the Patent Office on February 19, 2003. Accordingly, the present Appeal Brief is due by April 19, 2003 pursuant to MPEP §§ 512 and 1206. Filed concurrently herewith is a three (3) month extension of time so that the Appeal Brief is due July 19, 2003, which is a Saturday, making the present Appeal Brief due by Monday, July 21, 2003.

In compliance with 37 C.F.R. § 1.192, Appellant submits the following as his Appeal Brief in this matter through the undersigned counsel.

I. REAL PARTY IN INTEREST

The real party in interest for purposes of this appeal is the named inventor, Daniel W. Van Vleet, an individual residing at 525 1st Street, Gurley, Nebraska 69141.

II. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences known to the Appellant or the Appellant's legal representatives that will have a bearing on the Board's decision to be rendered in this Appeal.

III. STATUS OF CLAIMS

Claims 1-6 and 8-34 are currently pending in the application, have been finally rejected, and are hereby appealed. Claim 7 was previously cancelled in an Amendment dated November 6, 2002. No claims have been allowed.

IV. STATUS OF AMENDMENTS

In the final Office Action mailed November 18, 2002, the Examiner noted a typographical error present in the directions given to amend a paragraph in the specification. The Examiner also entered a rejection to claim 23 under 35 U.S.C. § 112 for lacking sufficient antecedent basis. Applicant has submitted concurrently herewith a proposed Amendment After Final pursuant to 37 C.F.R. § 1.116 and M.P.E.P. § 1207 to address these matters and thereby simplify the issues on appeal to only the Rule 1.131 Declaration, and the Section 102 and 103 issues. As the Amendment After Final is submitted concurrently with this Appeal Brief, the amendment has not at this time been acted upon by the Examiner.

Attached hereto as Appendix A is a copy of the current version of pending claims 1-6 and 8-34 involved in this Appeal, which includes the amendments made to the claims in the Amendment After Final.

V. SUMMARY OF THE INVENTION

The present invention relates to a portable campfire apparatus that provides a non-ember producing flame. The invention also includes a method of providing a portable campfire on a support surface. Broadly, the campfire includes a base to rest on the support surface, such as the ground, a fire pan filled with a quantity of low density, non-flammable particulate material, such as vermiculite, a spacer interposed between the base and the fire pan, and a gas manifold connected to a fuel source to introduce vaporized fuel into the interior of the fire pan. The vaporized gas migrates throughout the particulate material to the surface and, when ignited, provides the aesthetic attributes and heat of a regular wood-burning campfire. Even though the fuel is ignited, the particulate material remains relatively cool to the touch and does not produce embers that are typically discharged by wood burning campfires.

A first embodiment of the invention is illustrated in Figures 1-4 and is discussed beginning on page 10, line 7 of the application. As shown, campfire apparatus 10 includes base 20, fire pan 40, lid 60, and spacer 80. When the campfire apparatus is assembled, as discussed on page 11, beginning on line 15, spacer 80 is interposed between base 20 and fire pan 40, which are releasably secured together by means of carriage bolts 36 and nuts 38. Lid 60 is sized and adapted to enclose the interior of fire pan 40 and when mounted thereon, is supported by shoulder portion 58.

As shown in Figures 3-5 and discussed beginning on page 12, line 13, manifold 90 includes a toroidal main body 92 that extends proximately to the inner surface of fire pan 40 and an extension 96 that projects through the fire pan to connect to the source of fuel via connector 98. Main body 92 includes ports 94, which introduce vaporized

fuel into the pan interior 52 when connected to a source of fuel. As shown in Figures 2 and 5, and discussed on page 12, beginning on line 23, ports 94 are oriented so as to direct vaporized radially inwardly, toward an axis that is perpendicular to plane "P", which contains the rim 46 of fire pan 20.

The base, fire pan, and lid may have a variety of geometric configurations, such as those shown in Figures 10, 11, 13, and 16, which illustrate various other contemplated embodiments of the present invention. Similarly, the configuration of the gas manifold and the orientation of ports may also vary without departing from the scope of the present invention. Alternative gas manifolds are illustrated in Figures 6, 7, 10, 12, 17, 20, and 22.

Preferably, the base, fire pan, and lid each have the same geometric structure so as to reduce manufacturing costs. There is, however, another advantage in constructing the base and the fire pan substantially identically in the event the apparatus is purposely or inadvertently tipped over such that it is lying on the support surface on its side. Particularly, as discussed beginning on page 14, line 20 and shown in Figures 8 and 9, if the rim of the fire pan extends in a plane parallel to the support surface when in an upright position, and when in a tipped over position, the plane is oriented at no less than 90° to the support surface, the flame from the manifold will be extinguished. As a result, the particulate material will spill out of the fire pan, but is not likely to inadvertently spread unwanted fire due to its innate characteristics.

Finally, as discussed on page 19, beginning at line 5, the present invention is also directed to a method of providing an artificial campfire on a support surface. This method includes a first step of providing a fire pan having an interior and a gas manifold

with at least one gas outlet disposed in the interior thereof. Next, the fire pan is supported in spaced relation to the support surface such that the interior thereof is upwardly opening. The method includes the step of placing a quantity of low density, fire retardant particulate material in the fire pan at a depth sufficient to cover the manifold. The method then includes the step of introducing a fuel into the manifold so that vaporized fuel is injected into the particulate material and migrates upwardly therethrough without igniting until it reaches the surface. The method then includes the step of igniting the vaporized fuel along the surface of the particulate material.

VI. ISSUES

The following issues are believed by Appellant to be important for purposes of this Appeal:

- A. Does Appellant's Rule 1.131 Declaration and Supporting 1.131 Declarations, when considered in their entirety, establish a reduction to practice of the present invention prior to the effective date of the Pedersen et al. reference?**
 - 1. Was it improper for the Examiner to summarily dismiss Appellant's Rule 1.131 Declaration simply because the ports of the gas manifold are hidden from view in the photograph of the second prototype attached thereto?**
 - 2. Was it improper for the Examiner to consider Appellant's Rule 1.131 Declaration ineffective for not positively commenting upon activities irrelevant to the determination of whether the present invention was reduced to practice prior to the effective date of the Pedersen et al. reference?**
 - 3. Can Appellant's Rule 1.131 Declaration be deemed insufficient if it establishes possession of the whole invention claimed prior to the effective date of the Pedersen et al. reference?**
- B. Even if Appellant's Rule 1.131 Declaration is found to be ineffective to remove the Pedersen et al. reference as prior art, did the Examiner properly reject claims 21 and 25 as being anticipated by U.S. Patent No. 6,227,843 B1 to Pedersen et al.?**

1. Do Pedersen et al. teach an inwardly projecting shoulder portion disposed on the upper rim of the fire pan and extending continuously around the fire pan and adapted to support the lid?
 2. Do Pedersen et al. teach a fire pan in spaced relation above a base support?
- C. Has the Examiner established a *prima facie* case of obviousness under 35 U.S.C. § 103(a) of claims 1, 6, 9, 12, 13, 17, 19, 23, and 30 over U.S. Patent No. 6,227,843 B1 to Pedersen et al. in view of U.S. Patent No. 5,094,223 to Gonzalez?
1. Would a person of ordinary skill in the art be motivated by the teachings of Gonzalez to modify the Pedersen et al. portable gas campfire to include a spacer (claim 1)?
 2. Would a person of ordinary skill in the art be motivated by the teachings of Gonzalez to modify the Pedersen et al. campfire apparatus to include a base, a fire pan, and a lid that are each of substantially the same size and shape (claims 12 and 13)?
 3. Would a person of ordinary skill in the art be motivated by the teachings of Gonzalez to modify the Pedersen et al. portable gas campfire to include a hollow spacer (claims 17, 19, and 23)?
 4. Do Pedersen et al. teach an inwardly projecting shoulder portion disposed on the upper rim of the fire pan (claim 6)?
 5. Would a person of ordinary skill in the art be motivated by the teachings of Gonzalez to modify the Pedersen et al. portable gas campfire to include gas manifold outlets that direct vaporized fuel laterally toward an axis that is perpendicular to a plane containing a rim of the fire pan (claims 9 and 30)?
- D. Has the Examiner established a *prima facie* case of obviousness under 35 U.S.C. § 103(a) of claim 34 over U.S. Patent No. 6,227,843 B1 to Pedersen et al. in view of U.S. Patent No. 5,404,864 to Kent, Jr.?

VII. GROUPING OF THE CLAIMS

It is admittedly difficult to group any claims as standing or falling together because Appellant's Rule 1.131 Declaration¹ forms the primary basis of this appeal. Appellant's Rule 1.131 Declaration was submitted to swear behind U.S. Patent No. 6,227,843 B1 to Pedersen et al., which has been cited either alone or combination with another reference, to reject each pending claim. Accordingly, if Appellant's Rule 1.131 Declaration is considered by this Board to effectively swear behind the Pedersen et al. reference, the issue of whether the claims stand or fall becomes moot because all of the claim rejections must be reversed.

However, if this Board chooses to affirm the Examiner's position regarding Appellant's Rule 1.131 Declaration, Appellant asserts that claims 1, 6, 9, 12, 13, 17, 19, 21, 23, 25, 30, and 34 each stands alone. If claim 1 falls, then claims 2-5, 8, 11, and 14 fall. If claim 9 falls, then claim 10 falls. If claim 25 falls, then claims 26 and 27 fall. If claim 30 falls, then claim 31 falls.

If the Board affirms the Examiner's position regarding Appellant's Rule 1.131 Declaration, then Appellant agrees that the rejections to claims 15, 16, 18, 20, 22, 24, 28, 29, 32, and 33 are proper.

VIII. ARGUMENT

- A. Does Appellant's Rule 1.131 Declaration and Supporting 1.131 Declarations, when considered in their entirety, establish a reduction to practice of the present invention prior to the effective date of the Pedersen et al. reference?**

¹ As used hereinafter, "Appellant's Rule 1.131 Declaration" shall collectively refer to Appellant's Rule 1.131 Declaration, the three Supporting 1.131 Declarations of Robert Van Vleet, Todd Keller, and Roger Rezac, as well as the associated attachments thereto.

In the first Office Action mailed in this case, dated April 22, 2002, the Examiner cited U.S. Patent No. 6,227,843 B1 to Pedersen et al. to reject various claims of the application. The patent to Pedersen et al. issued on May 8, 2001, which is less than one year prior to the filing date of the present application, and claims priority through provisional application no. 60/137,610, which was filed on June 3, 1999. Appellant reduced his invention to practice, as disclosed and claimed in the subject application, prior to June 3, 1999. Accordingly, Appellant submitted a Rule 1.131 Declaration as part of its response to the Examiner's first Office Action to address those claims rejected over Pedersen et al.

Section 1.131 of Title 37 of the Code of Regulations provides a mechanism whereby a patent applicant may demonstrate prior invention to antedate a reference that qualifies as prior art under 35 U.S.C. § 102(a). M.P.E.P. § 715. There are three ways in which an applicant can establish prior invention of the claimed subject matter:

- (A) reduction to practice of the invention prior to the effective date of the reference; or
- (B) conception of the invention prior to the effective date of the reference coupled with due diligence from prior to the reference date to a subsequent (actual) reduction to practice; or
- (C) conception of the invention prior to the effective date of the reference coupled with due diligence from prior to the reference date to the filing date of the application (constructive reduction to practice).

37 CFR 1.131(b); MPEP § 715.07. Appellant's Rule 1.131 Declaration was submitted to prove the first of these three ways – that he reduced to practice the invention as disclosed and claimed in the subject application prior to June 3, 1999, the effective date of the patent to Pedersen et al.

Proof of a reduction to practice prior to the effective filing date of a reference requires more than a general allegation that the invention was completed prior to the effective date of the reference. M.P.E.P. § 715.07. Evidence in the form of sketches, blueprints, photographs, reproductions of notebook entries, models, and supporting statements by witnesses may accompany the declaration to substantiate a statement of facts. M.P.E.P. § 715.07.

As the inventor of the present invention, Appellant submitted his own declaration, which provided a showing of facts that he reduced to practice his campfire apparatus well before June 3, 1999. His declaration was supported by the declarations of Robert Van Vleet, Todd Keller, and Roger Rezac, which provided corroborating evidence to support his statement of facts. In addition to these supporting declarations, photographs of two prototypes, which were discussed in Appellant's declaration and each of the supporting declarations, were attached as exhibits.

For ease in determining the issue as to whether Appellant's Rule 1.131 Declaration establishes a reduction to practice of the invention, Appellant has attached hereto a true and correct copy of the following documents that formed the Rule 1.131 Declaration:

- Exhibit B:** Declaration of Appellant/Inventor – Daniel Van Vleet (without attachments)
- Exhibit C:** Supporting Declaration of Robert Van Vleet (without attachments)
- Exhibit D:** Supporting Declaration of Todd Keller (without attachments)
- Exhibit E:** Supporting Declaration of Roger Rezac (without attachments)

Exhibit F: Photographs of the toolbox prototype²

Exhibit G: Photographs of the second prototype³

As required, Appellant's Rule 1.131 Declaration sets forth facts to prove that a campfire apparatus actually existed and worked for its intended purpose. Specifically, Appellant's Declaration proves that two campfire prototypes existed prior to June 3, 1999. The first campfire apparatus, referred to as the "toolbox prototype" was completed sometime in August 1998 and included the following features:

- a. A fire pan in the form of a toolbox;
- b. A toolbox lid;
- c. A gas manifold disposed in the toolbox with at least one gas outlet operative to introduce vaporized fuel into the toolbox interior;
- d. A connector associated with the gas manifold connecting it to a propane tank through an opening formed in the base of the toolbox;
and
- e. A quantity of vermiculite disposed in the toolbox at a depth sufficient to cover the gas manifold.

The second prototype was completed sometime in March 1999 and incorporated various other features, in addition to those of the toolbox prototype. In particular, the second prototype included the following features:

² Photographs of the toolbox prototype were attached as Exhibit A to Daniel Van Vleet's Declaration as well as each supporting declaration.

³ Photographs of the toolbox prototype were attached as Exhibit B to Daniel Van Vleet's Declaration as well as each supporting declaration.

- a. A base to rest on a support surface;
- b. A fire pan supported by the base, including a main body portion having an inner surface, an upper rim, and a pan interior;
- c. A lid sized to enclose the pan interior;
- d. A spacer interposed between the fire pan and the base;
- e. A gas manifold disposed in the interior of the fire pan and having at least one gas outlet to introduce vaporized fuel into the fire pan;
- f. A connector to connect the gas manifold to a fuel canister; and
- g. A quantity of vermiculite disposed in the fire pan at a depth sufficient to cover the gas manifold.

With respect to the above-listed features of the second prototype, the base, the fire pan, and the lid each had substantially the same geometric configuration – a truncated frustum, while the spacer was substantially cylindrical. The base and the fire pan were releasably secured together with carriage bolts and nuts. The upper rim of the fire pan had an inwardly projecting shoulder to support the lid. In addition, the upper rim was constructed such that if the stove was tipped over, it would be oriented at no less than 90° to the support surface. The gas manifold extended around the inner surface of the fire pan and had a plurality of ports that directed vaporized fuel radially inwardly into the particulate material.

When reviewing a Rule 1.131 Declaration, the Examiner must consider all of the evidence presented in its entirety, including the declarations and all accompanying exhibits. M.P.E.P. § 715.07. When considered in its entirety, Appellant's Rule 1.131 Declaration, as submitted, clearly establishes the reduction to practice of the campfire

apparatus disclosed and claimed in the independent claims in this application well before the June 3, 1999 effective filing date of Pedersen et al. The supporting evidence provided is such that one of ordinary skill in the art would be satisfied to a reasonable certainty that the Appellant possessed the whole invention, as claimed, sometime in March 1999. Despite this evidentiary support, the Examiner rejected Appellant's 1.131 Declaration in her final Office Action dated November 18, 2002. Noteworthy is the fact that among her reasons for rejecting the Declaration, she never questions whether the campfire apparatus of the present application was reduced to practice by March 1999.

- 1. Was it improper for the Examiner to summarily dismiss Appellant's Rule 1.131 Declaration simply because the ports of the gas manifold are hidden from view in the photograph of the second prototype attached thereto?**

The main reason the Examiner provided for rejecting Appellant's Rule 1.131 Declaration is as follows:

The declaration is defective in that there is an obvious contradiction between that presented as the second prototype in the description as stated in section 13 on pages 4 and 5, and that shown in the photograph of Exhibit B. Section 13 recites, "The gas manifold extended around the inner surface of the fire pan and a plurality of ports that directed vaporized fuel radially inwardly into the particulate material." However, that seems impossible given the photograph, Exhibit B. Exhibit B shows a "flat pan type" burner rather than a ring. Therefore, particulate material can only be located outward and around the burner and fuel would not be directed radially inward. This obvious contradiction renders the declaration defective, and thus, it is not effective in removing the Pedersen et al. reference.

For the most part, the Examiner found Appellant's Rule 1.131 Declaration defective simply because the ports that introduce vaporized fuel into the fire pan are concealed from view in and accompanying photograph. Based upon her perception of the photograph, she drew the erroneous conclusion that the second prototype employs a

"flat pan type" burner, which led to her belief that it "seems impossible" for the ports to direct vaporized fuel radially inwardly into the particulate material.

Appellant's Rule 1.131 Declaration should not be rendered defective simply because something "seems impossible" to the Examiner. If Appellant attached a photograph of the second prototype with the lid mounted thereon, would it thus seem impossible for the fire pan to hold a quantity of particulate material? Admittedly, the ports are not shown in a photograph of the second prototype, but that does not render their existence impossible. Indeed, the ports are formed along the inner surface of a ring located underneath the top metal cap and operate to direct vaporized fuel radially inwardly into the particulate material that collects underneath the cap.

Moreover, Appellant submits that the Examiner ignored his declaration, and each supporting declaration, to arrive at her own conclusions as to the ports of the second prototype. To do so is improper for two reasons: first, the Examiner *must* consider *all* of the evidence presented in its entirety when reviewing a Rule 1.131 Declaration; secondly, accompanying exhibits, such as the photograph in question, need not support all claimed limitations provided that any missing limitation is supported by the declaration itself." M.P.E.P. § 715.07 citing *Ex part Ovshinsky*, 10 USPQ2d 1075 (Bd. Pat. App. & Inter. 1989) (emphasis added).

The ports in the photograph attached as Exhibit B are concealed from view, but this limitation is clearly supported in the declaration of Daniel Van Vleet, as well as the supporting declarations of Robert Van Vleet, Todd Keller, and Roger Rezac. Accordingly, when considered in its entirety, Appellant's Rule 1.131 Declaration

supports the claimed limitation that the second prototype includes a gas manifold with ports that direct vaporized fuel radially inwardly into the particulate material.

Appellant submits that its Rule 1.131 Declaration is not defective and the Examiner's reasoning for rejecting the declaration is both flawed and improper. Appellant respectfully requests that this Board find his Rule 1.131 Declaration to be effective to antedate the patent to Pedersen et al.

2. Was it improper for the Examiner to consider Appellant's Rule 1.131 Declaration ineffective for not positively commenting upon activities irrelevant to the determination of whether the present invention was reduced to practice prior to the effective date of the Pedersen et al. reference?

In addition to the Examiner's reasoning for finding Appellant's Rule 1.131 Declaration defective, as provided above, the Examiner "noted" the following:

... the Applicant has not positively commented on whether the prototype was discussed in a public forum, on sale, or shown (whether demonstrated or shown in photographs) to others in the public during this time period, which would render this as a 35 U.S.C. 102(b) bar. Further, there has been no comment as to the time gap/delay from reduction to practice until application filing.

The purpose of a Rule 1.131 Declaration is to antedate or "swear behind" a reference or activity that is being used to reject the claims of a pending patent application. Accordingly, the sole issue before any Examiner when reviewing a Rule 1.131 Declaration is to determine whether the facts presented are sufficient to show:

- (A) reduction to practice of the invention prior to the effective date of the reference; or
- (B) conception of the invention prior to the effective date of the reference coupled with due diligence from prior to the reference date to a subsequent (actual) reduction to practice; or
- (C) conception of the invention prior to the effective date of the reference coupled with due diligence from prior to the reference

date to the filing date of the application (constructive reduction to practice).

37 C.F.R. § 1.131. It is not incumbent upon any applicant to present a showing of facts in its Rule 1.131 Declaration that fall outside the scope of any one of the above listed ways of establishing prior invention. Nor is it an applicant's burden in a Rule 1.131 Declaration to attempt to foresee issues an Examiner may raise that are irrelevant to the issue of antedating a reference.

Here, Appellant provided a showing of facts sufficient to prove a reduction to practice of the invention prior to June 3, 1999. The Examiner, however, appears to be disinterested in whether the facts presented effectively antedate the patent to Pedersen et al. Rather, the Examiner appears to be focused on completely unrelated issues of prior public disclosure and abandonment of the invention. Facts related to these issues are outside of the scope of Appellant's Rule 1.131 Declaration. Furthermore, the Examiner never raised these issues at any time previous to the submission of Appellant's Rule 1.131 Declaration and therefore were only first raised in her final Office Action dated November 18, 2002.

Section 715.10 of the M.P.E.P. states

any affidavits or declarations submitted under 37 CFR 1.131 and the accompanying evidence must be reviewed carefully by the examiner in order to determine whether they show that the claimed invention was 'in public use' or 'on sale' in this country more than one year prior to the effective filing date of the application, which acts constitute a statutory bar under 35 U.S.C. 102(b).

It appears from the Examiner's comment that she undertook this review of Appellant's Rule 1.131 Declaration. Notably, however, she was unable to find any evidence in Appellant's Rule 1.131 Declaration that would constitute a statutory bar under 35 U.S.C.

§ 102(b). To the contrary, the Examiner only noted the *absence* of any evidence that the prototype was discussed in a public forum, on sale, or shown to others in public during the time period that would render the activity a 102(b) bar.

Appellant asserts that the Examiner seems to blend new rejections of the claims under 35 U.S.C. §§ 102(b) and 102(g) into her analysis for rejecting Appellant's Rule 1.131 Declaration. Raising a new rejection of the claims on the basis of either a Section 102(b) or 102(g) rejection is an entirely separate matter that has no bearing as to whether Appellant's Rule 1.131 Declaration was effective to antedate the Pedersen et al. reference.

3. Can Appellant's Rule 1.131 Declaration be deemed insufficient if it establishes possession of the whole invention claimed prior to the effective date of the Pedersen2 et al. reference?

Finally, the Examiner reasoned that Appellant's Rule 1.131 Declaration is "insufficient in covering all claimed subject matter." Specifically, the Examiner has taken the position that the Declaration is insufficient to cover the following elements⁴:

- a. the gas manifold shape of claim 8;
- b. the fire pan configuration of claim 11;
- c. a spacer having a hollow interior of claims 17, 19, and 23;
- d. the gas manifold ports in spaced apart relation of claims 10 and 22;
- e. a reservoir to provide fuel of claims 24;
- f. a fire pan with an aperture recited in claim 32; and
- g. a gas manifold that directs fuel laterally toward an axis that is perpendicular to a plane containing the rim of the fire pan of claim 9.

⁴ The listing provided (a – g) is not the same order as that presented in the Examiner's Office Action.

Appellant agrees that the presentation of facts in Appellant's Rule 1.131 Declaration is insufficient to show the gas manifold shape of claim 8 and the fire pan configuration of claim 11. Indeed, this claimed subject matter had not been reduced to practice prior to the effective date of the Pedersen et al. reference. However, as these are dependent claims, should the Board reverse the Examiner's position regarding the effectiveness of the Rule 1.131 Declaration, the rejections to claims 8 and 11 will be reversed.

Appellant asserts that its Rule 1.131 Declaration is sufficient to cover the claimed subject matter of claims 17, 19, and 23 simply due to the fact that his Rule 1.131 Declaration provides a sufficient showing of facts to prove possession of a spacer. Regardless of whether Appellant's Rule 1.131 Declaration proves possession of a hollow spacer, it would have little to no bearing as to whether the Rule 1.131 Declaration is effective to remove Pedersen et al. as prior art because Pedersen et al. do not teach a spacer.

With respect to claims 10 and 22, the Examiner takes the position that Appellant's Rule 1.131 Declaration is insufficient to show that the ports are spaced apart. The Examiner has not denied that the presentation of facts is sufficient to show that Appellant possessed a gas manifold with a plurality of ports. For there to be a plurality of ports, they must necessarily be spaced apart, otherwise, a *plurality* of ports could not be defined. Accordingly, Appellant asserts that its Rule 1.131 Declaration is sufficient to cover the claimed subject matter of claims 10 and 22.

Similarly, with respect to claims 24 and 32, there can be no question from the presentation of facts in Appellant's Rule 1.131 Declaration that the campfire apparatus is adapted to connect to a source of fuel that travels to the gas manifold and out the

ports. Again, the Examiner has not taken the position that the declaration is insufficient to show that the campfire apparatus does not include a gas manifold located in the fire pan. Inherent in the fact that the campfire apparatus includes a gas manifold is the understanding that the gas manifold needs to be connected to a fuel source to be useful. Further, as shown in the photograph of the second prototype, the connection between the gas manifold and the fuel source is achieved by a hose that is connected to the gas manifold through the wall of the fire pan. Accordingly, inherent in this apparatus is an aperture in the fire pan that allows for the gas manifold to be in fluid communication with the fuel source. The aperture in the fire pan is clearly proven in Appellant's presentation of facts.

With respect to claim 9, the Examiner takes the position that Appellant's Rule 1.131 Declaration is insufficient to show that the gas manifold includes ports that direct fuel laterally toward a axis that is perpendicular to a plane containing the rim of the fire pan. For reasons provided above in Section VIII A.1., Appellant asserts that this subject matter is covered in Section 13 of Daniel Van Vleet's Declaration, as well as Section 8 of each of the supporting declarations.

Based on the foregoing, Appellant asserts that his Rule 1.131 Declaration is sufficient to cover all of the claimed subject matter. However, even if this Board were to conclude that Appellant's Rule 1.131 Declaration was insufficient to cover some or all of the subject matter of claims 8, 10, 11, 17, 19, 22-24 and 32, Appellant has still met his burden to antedate the Pedersen et. al reference as to the independent claims.

The test in determining whether a Rule 1.131 Declaration is sufficient to antedate a reference or activity is "whether the facts set out in the [declaration] are such as would

persuade one skilled in the art that the applicant possessed so much of the invention as is shown in the reference. M.P.E.P § 715.03 citing *In re Schaub*, 537 F.2d 509, 190 USPQ 324 (CCPA 1976). When viewed in its entirety, Appellant submits that his Declaration has carried this burden. Noteworthy is the fact that nowhere in the Examiner's final Office Action did she raise an argument as to the sufficiency of facts presented to show a completion of a campfire apparatus that includes the following elements:

- a. A base to rest on a support surface;
- b. A fire pan supported by the base, including a main body portion having an inner surface, an upper rim, and a pan interior;
- c. A lid sized to enclose the pan interior;
- d. A spacer interposed between the fire pan and the base;
- e. A gas manifold disposed in the interior of the fire pan and having at least one gas outlet to introduce vaporized fuel into the fire pan;
- f. A connector to connect the gas manifold to a fuel canister; and
- g. A quantity of vermiculite disposed in the fire pan at a depth sufficient to cover the gas manifold.

Appellant asserts that a showing of the above-listed elements, alone, would persuade one skilled in the art that he possessed the whole invention. Accordingly, it is submitted that the Examiner has improperly rejected Appellant's Rule 1.131 Declaration on the grounds that it is insufficient to cover all claimed subject matter.

- B. Even if Appellant's Rule 1.131 Declaration is found to be ineffective to remove the Pedersen et al. reference as prior art, did the Examiner properly reject claims 21 and 25 as being anticipated by U.S. Patent No. 6,227,843 B1 to Pedersen et al.?**

If the Board determines that Appellant's Rule 1.131 Declaration is ineffective to remove the Pedersen et al. patent as prior art, Appellant asserts that the Examiner has failed properly reject claims 21 and 25 as being anticipated by Pedersen et al.

In order for a reference to anticipate the claim under 35 U.S.C. § 102, the reference must show exactly what is claimed. *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985). This includes each element and each limitation of the claim. *Hoover Group, Inc. v. Custom Metalcraft, Inc.*, 66 F.3d 299, 36 USPQ2d 1101 (Fed. Cir. 1995). If there are differences, whether characterized as insubstantial, there is no anticipation, even where the missing element could be supplied by the knowledge of one skilled in the art. *Structural Rubber Prod. Co. v. Park Rubber Co.*, 749 F.2d 707, 223 USPQ 1264 (Fed. Cir. 1984).

1. **Do Pedersen et al. teach an inwardly projecting shoulder portion disposed on the upper rim of the fire pan and extending continuously around the fire pan and adapted to support the lid?**

Claim 21 of the present application recites a portable camping stove that comprises (1) a base adapted to rest on a support surface; (2) a fire pan including a main body portion constructed as a fire pan shell with an upper rim so as to have a pan interior; (3) a gas manifold disposed in the pan interior; (4) a lid sized and adapted to enclose the pan interior; and (5) an inwardly projecting shoulder portion disposed on the upper rim of the fire pan and extending continuously around the fire pan and adapted to support the lid.

Pedersen et al. lack an inwardly projecting shoulder portion disposed on the upper rim of the fire pan. However, the Examiner has taken the position that internal brackets 18 are an inwardly projecting shoulder. Appellant disagrees. Pedersen et al.

teach "brackets 18 contact the vertical annular wall 20 of base 14 to limit downward travel of lid 16 over base 14." (Col 3, lines 18-20). Turning then to Figure 1, brackets 18 are shown two individual brackets that are positioned on either side of base 14. As such, brackets 18 do not extend continuously around the fire pan. Pedersen et al. lack any other teaching that lid 16 is supported over base 14 by any means other than brackets 18. Accordingly, Pedersen et al. cannot anticipate claim 21 of the present application.

2. Do Pedersen et al. teach a fire pan in spaced relation above a base support?

Claim 25 recites a method of providing an artificial campfire on a support surface and includes the step of positioning the fire pan in spaced relation above a base support disposed on the support surface. Pedersen et al. does not teach a campfire apparatus wherein the fire pan is in spaced relation to the base. Rather, as taught, the campfire apparatus has a base 12 and a fire pan 14. As perhaps best shown in Figure 1, which shows the campfire apparatus in cross-section, the fire pan 14 is not in spaced relation to base 12. Furthermore, as discussed in Column 3, the reference teaches that the base and the fire pan may be secured together by welding. (lines 14-15). Since Pedersen et al. do not teach a spacer, or some other means by which the fire pan is in spaced relation to the base, it cannot anticipate claim 25.

C. Has the Examiner established a *prima facie* case of obviousness under 35 U.S.C. § 103(a) of claims 1, 6, 9, 17, 19, 23, and 30 over U.S. Patent No. 6,227,843 B1 to Pedersen et al. in view of U.S. Patent No. 5,094,223 to Gonzalez?

The Examiner has also failed in several instances to make out a *prima facie* case of obviousness, and, in some instances, has fallen into the "hindsight trap" so often cautioned

against by the Federal Circuit Court of Appeals. A *prima facie* case of obviousness requires that the prior art reference (or references when combined) teach or suggest all the claim limitations. *In re Vaeck*, supra; *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (C.C.P.A. 1974); *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970) ("All words in a claim must be considered in judging patentability of that claim against the prior art."); MPEP §2143.03.

Further, a *prima facie* case of obviousness also requires that there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q. 2d 1438 (Fed. Cir. 1991); *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q. 2d 1596 (Fed. Cir. 1988); *In re Jones*, 958 F.2d 347, 21 U.S.P.Q. 2d 1941 (Fed. Cir. 1992). In establishing a *prima facie* case of obviousness under 35 U.S.C. §103, it is incumbent upon the Examiner to provide a reason why one of ordinary skill in the art would have been led to modify a prior art reference or to combine reference teachings to arrive at the claimed invention. See *Ex parte Clapp*, 227 U.S.P.Q. 972, 973 (Bd. Pat. App. & Int. 1985).

To this end, the requisite motivation must stem from some teaching, suggestion or inference in the prior art as a whole or from the knowledge generally available to one of ordinary skill in the art and not from the applicant's disclosure. See, e.g., *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1052, 5 U.S.P.Q.2d 1434 (Fed. Cir.), *cert denied*, 488 U.S. 825 (1988); *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991) (The teaching or suggestion to make the claimed combination must not be based on applicant's disclosure); MPEP §2142. That is, it is improper to use hindsight reconstruction of the

claimed invention using the applicant's structure as a template. *In re Gorman*, 18 U.S.P.Q. 2d 1885 (Fed. Cir. 1991). When the only suggestion to combine the teachings of the references in the manner proposed by the Examiner is found in the hindsight accorded one who first views the applicant's disclosure, an obviousness rejection under 35 U.S.C. §103 is improper. See *In re Fritch*, 972 F.2d 1260, 1266, 23 U.S.P.Q.2d 1780, 1784 (Fed. Cir. 1992).

It is axiomatic that the mere fact that the prior art structure could be modified does not make such a modification obvious unless the prior art *suggests the desirability of doing so*. See *In re Gordon*, 733 F.2d 900, 902, 221 U.S.P.Q. 1125, 1127 (Fed. Cir. 1984); *In re Mills*, 916 F. 2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990); MPEP § 2143.01 Further, the fact that the claimed invention is within the capabilities of one of ordinary skill in the art is not sufficient to establish a prima facie case of obviousness without some objective reason to combine the teachings of the references. *Ex parte Levengood*, 28 USPQ2d 1300 (Bd. Pat. App. & Inter. 1993).

1. **Would a person of ordinary skill in the art be motivated by the teachings of Gonzalez to modify the Pedersen et al. portable gas campfire to include a spacer?**

In the Examiner's final Office Action, several claims have been rejected as being obvious over Pedersen et al. in view of Gonzalez. However, Appellant asserts that one of ordinary skill in the art would never look to the teachings of Gonzalez because Gonzalez teaches a wood burning fire pit while the objective of Pedersen et al. is to *simulate* a wood burning campfire. Arguably then, Gonzalez employs a structure that would be primarily unsuitable for an apparatus trying to simulate a wood burning campfire.

In any event, the Examiner has taken the position that one of ordinary skill would modify the Pedersen et al. campfire apparatus to include the spacer taught in Gonzalez. Gonzalez teaches a portable wood burning fire pit that includes a base 24, a spacer 30, and a fire pan 35, all of which are perhaps best shown in Figure 3. As shown, base 24 supports spacer 30, and spacer 30 supports fire pan 35. Spacer 30 is referred to in Gonzalez as a "fire bowl" (Col. 2, line 66) and its function is perhaps best shown in Figure 3. As shown, pieces of wood are stacked in fire pan 35 where it is adapted to burn by both burners 60 and 62. Fire bowl 30 supports the stacked wood, serves as a shield for the bottom burner ring 60 (Col. 4, lines 32-35), and collects ash from the wood burning.

Appellant asserts that one of ordinary skill in the art would not be motivated by Gonzalez to modify the Pedersen et al. campfire apparatus to include a spacer in the form of a fire bowl. First of all, the fire pan 14 in Pedersen et al. has a pan interior to hold the vermiculite (Fig. 1) and has no need for a separate bowl, or spacer, to hold the vermiculite. In order for the bowl to be used in this way, the bottom of the fire pan would have to be completely removed so as to form a cylindrical tube adapted to sit in the bowl. This would destroy the function of the Pedersen et al. fire pan.

Secondly, the enclosed fire pan 14 shields the gas manifold, so there is no need for a secondary shield, in the form of a bowl, to shield the burner from wind or other outdoor elements. Finally, vermiculite does not produce ash and so there is no need for a separate piece between the base and the fire pan for collecting ashes.

Based on the foregoing, then, one of ordinary skill in the art would not be motivated to add an additional, non-functional piece between the fire pan and the base of the Pedersen et al. campfire apparatus.

2. Would a person of ordinary skill in the art be motivated by the teachings of Gonzalez to modify the Pedersen et al. campfire apparatus to include a base, a fire pan, and a lid that are each of substantially the same size and shape (claims 12 and 13)?

Both Pedersen et al. and Gonzalez teach an apparatus having a base, a fire pan, and a lid. However, both references fail to teach a base and a fire pan of substantially the same size and configuration. Moreover, both references fail to teach a lid of substantially the same size and configuration as the base and the fire pan. The Examiner seems to take the position that it would be an obvious to modify Pedersen et al. to have " a fire pan and base be substantially the same configuration and size which in the tipped-over position the plane of the upper rim is oriented at no less than ninety degrees to the support surface. Appellant disagrees and submits that the Examiner has engaged in improper hindsight reasoning to arrive at Appellant's claimed invention.

First, neither reference teaches or even suggests modifying the respective apparatus from the configuration shown therein. Moreover, neither reference teaches or even suggests structuring the campfire apparatus in a manner that serves as a safety precaution in the event the apparatus is in the tipped over position. Accordingly, both references are deficient in offering any reason or motivation to modify either apparatus to include a base and a fire pan of substantially the same size and configuration or a lid of substantially the same size and configuration as the base and the fire pan.

Moreover, structuring the campfire apparatus of the present invention to include a base, fire pan, and lid of substantially the same size and configuration has significant

manufacturing advantages in that each of the three pieces can be stamped by the same machine. This allows for a cost efficient and time efficient manufacture of the campfire apparatus. Furthermore, packaging the campfire apparatus of the present invention requires far less packaging space. Accordingly, Appellant submits that structuring the campfire apparatus of the present invention in this way is not a simple matter of design choice and cannot be concluded to be an obvious modification of the Pedersen et al. reference.

3. Would a person of ordinary skill in the art be motivated by the teachings of Gonzalez to modify the Pedersen et al. portable gas campfire to include a hollow spacer (claims 17, 19, and 23)?

As discussed above, Gonzalez teaches a spacer in the form of a fire bowl 30, which is a shallow, concave bowl that resembles a wok when attached to the base. (Col. 3, lines 1-2). Accordingly, Gonzalez fails to teach a hollow spacer. Assuming, *arguendo*, one of ordinary skill in the art desired to modify the Pedersen et al. campfire apparatus by adding a fire bowl 30 in between the base and the fire pan, it would not thereby employ a *hollow* spacer. As such, not all of the claim limitations, as recited in claims 17, 19, and 23 would be met.

4. Do Pedersen et al. teach an inwardly projecting shoulder portion disposed on the upper rim of the fire pan (claim 6)?

As noted above in Section VIII.B.1., Pedersen et al. fails to teach an inwardly projecting shoulder portion disposed on the upper rim of the fire pan and extending continuously around the fire pan and adapted to support the lid. The arguments of that section are incorporated herein. Similarly, Gonzalez does not teach a fire pan with an inwardly projecting shoulder disposed on its upper rim. At best, Gonzalez teaches a

tube 36 reinforced with a top ring 40 that includes an *outward* and downward flange that serves to help secure a safety skirt 42, neither of which is an inwardly projecting shoulder disposed on the upper rim of the fire pan. As such, a combination of the teachings of Pedersen et al. and Gonzalez would not arrive at the claimed invention as claimed in claim 6.

5. Would a person of ordinary skill in the art be motivated by the teachings of Gonzalez to modify the Pedersen et al. portable gas campfire to include gas manifold outlets that direct vaporized fuel laterally toward an axis that is perpendicular to a plane containing a rim of the fire pan (claims 9 and 30)?

Pedersen et al. specifically teach that an object of the invention is to provide a more aesthetically pleasing outdoor campfire. Particularly, Pedersen et al. teach that an object of the invention is to provide "the use of small particulate filler which presents much more the impression of a smooth surface through which gas jets are radially inwardly inclined so as to simulate, once lit, a conically-shaped campfire. (Col. 1, lines 45-50). Gonzalez, on the other hand, teaches that the ports direct fuel laterally into the wood, to quickly and efficiently burn the wood in the fire pan and advance the wood fire to hot coal status. (Col. 1, lines 49-51).

Again, given the differing objectives between the campfire apparatuses taught in Pedersen et al. and Gonzalez, Appellant submits that one of ordinary skill in the art would not be motivated to change the direction of the vaporized fuel in the Pedersen et al. campfire apparatus. Primarily, Pedersen et al. are concerned with accomplishing a fire with a generally conical appearance, which is effected by the direction that the ports direct vaporized fuel to the surface of the vermiculite. Nowhere in Pedersen et al. is it taught or even suggested that a general conical appearance could be achieved if the

orifices were directed in any other way than radially inwardly and upwardly. Arguably, the general conical appearance of the fire would be distorted or even lost by directing the ports laterally toward an axis that is perpendicular to a plane containing the rim of the fire pan. Accordingly, as mentioned above, just because a structure could be modified does not make such a modification obvious unless the prior art *suggests the desirability of doing so*. Neither Pedersen et al. nor Gonzalez suggest a desirability to modify the ports of the Pedersen et al. campfire apparatus.

D. Has the Examiner established a *prima facie* case of obviousness under 35 U.S.C. § 103(a) of claim 34 over U.S. Patent No. 6,227,843 B1 to Pedersen et al. in view of U.S. Patent No. 5,404,864 to Kent, Jr.?

The Examiner takes the position that Kent, Jr. teaches an outdoor cooking system that includes a planar base 22, a fire pan (generally at 34)⁵, and spacer 26. She asserts that one of ordinary skill in the art would be motivated by the teachings of Kent, Jr. to modify the Pedersen et al. campfire apparatus to include a spacer 26, thus arriving at the invention as claimed in claim 34.

Similarly to the arguments asserted with respect to Gonzalez, it is arguable that one of ordinary skill in the art would never look to Kent, Jr. to modify the Pedersen et al. campfire apparatus because Kent, Jr. is a solid fuel burning system rather than a gas burning system. Arguably then, Kent, Jr. employs a structure that would be primarily unsuitable for an apparatus trying to simulate a solid fuel burning campfire.

The Kent, Jr. cooking system is constructed to be portable, collapsible, and "adaptable for use as a fuel igniter, as a food warmer, and as a cook stove." (Col. 2,

⁵ While the Examiner has indicated that the fire pan taught in Kent, Jr. is generally at 34, it is believed that the fire pan includes section 28, which is described as the fuel containment section. (Col. 3, lines 60-67).

lines 10-15). The cooking system is comprised of a combustion tube 14 with a plurality of flaps that are used to control the intake and outflow of air. (Col 2, lines 19-21). The combustion tube may be divided into three regions: the pre-ignition chamber 16a or 26, the fire chamber 16b or 28, open tube 16c or 30. (Col. 3, lines 10-68). Each of these three regions works together, "each section being configured to facilitate operation of a particular combustion task." (Col. 3, lines 61-64).

The lower region, 16a or 26, which is considered by the Examiner to be the spacer, is described in Kent, Jr. as the pre-ignition chamber, and is "capable of containing a suitable pre-ignition agent 18 such as paper, cardboard or other kindling." (Col. 3, lines 13-16). It also acts as the "air intake section" and "configurable to effect control over the flow of heat and air." (Col. 3, line 65 – Col. 4, line 2).

With this structure in mind, it may be seen that one of ordinary skill in the art would not be motivated by Kent, Jr. to modify the Pedersen et al. campfire apparatus to include a pre-ignition chamber such as that described therein. Pedersen et al. employs a gas burner tube and thus does not need a pre-ignition chamber capable of burning paper, cardboard, or other kindling. Accordingly, the addition a pre-ignition chamber between the base and the fire pan would be worthless to the Pedersen et al. campfire apparatus. As such, one of ordinary skill in the art would not be motivated to employ one.

IX. CONCLUSION

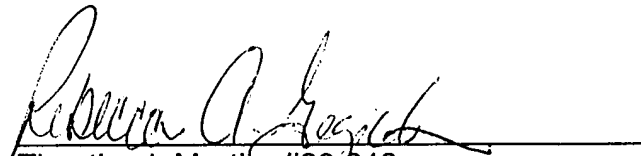
Based on the foregoing, Appellant submits that the Examiner improperly dismissed his Rule 1.131 Declaration. The Rule 1.131 Declaration was seasonably presented, and the facts presented therein were amply supported by evidence in the

form of photographs and the corroborating statements of three (3) witnesses to establish the conception and actual reduction to practice of a campfire apparatus prior to the effective date of the Pedersen et al. reference. Accordingly, Appellant respectfully requests that the Board reverse the Examiner's decision and grant allowance to all pending claims.

In the event that the Board finds Appellant's Rule 1.131 Declaration ineffective to antedate the Pedersen et al. reference, Appellant submits that as argued above, claims 1-14, 17, 19, 21, 23, 25-27, 30, 31, and 34 are allowable either because the Examiner improperly rejected these claims.

Respectfully submitted,

TIMOTHY J. MARTIN, P.C.

A handwritten signature in black ink, appearing to read "Timothy J. Martin", is written over a horizontal line.

Timothy J. Martin, #28,640
Michael R. Henson, #33,762
Rebecca A. Gegick, #
9250 W. 5th Avenue, Suite 200
Lakewood, Colorado 80226
(303) 232-3388